INTRODUCTION

This proceeding was reopened on the Commission's own motion as a result of the determination by Chairman Mathias and Commissioners Kretschmer and Harvill that additional information was needed concerning several statutory issues which must be considered in this proceeding. In a letter to the Hearing Examiners dated June 4, 1999, the Chairman stated that he and the aforementioned Commissioners desired additional information concerning several issues including the proposed merger's effect on competition. Attachment A to the June 4th letter identified several specific issues which SBC and Ameritech Illinois ("Joint Petitioners" or "SBC-Ameritech") and the parties were invited to address.

On June 10, 1999, Joint Petitioners filed their Amended Joint Application, as well as additional evidence in support of that filing, including proposed conditions to the merger. In response, on June 15, 1999, the Chairman sent another letter to the Hearing Examiners which contained an attachment that raised specific issues concerning Joint Petitioners' amended filing. The Chairman asked that the parties address the issues identified in the Attachment to the June 15th letter. On June 18, 1999, Joint Applicants filed their response to this letter.

Finally, on July 9, 1999, the Chairman sent a letter to the Hearing Examiners directing them to request that the parties file draft orders with their initial briefs outlining any specific conditions they seek to be included in the final order in this proceeding.

Covad Communications Company ("Covad") has endeavored to respond to the

Commission's concerns on reopening through the testimony of Clay Deanhardt, its Senior Counsel.[1]

The record in this proceeding demonstrates that the Commission must carefully examine the commitments offered by SBC-Ameritech in order to ensure that those commitments will have their intended effect -- promoting competitive entry in Illinois. Covad believes that when this examination is made -- based upon the complete record, not just SBC-Ameritech's characterization of it -- the Commission will quickly realize that

[1]Covad is a competitive local telecommunications service provider focused *entirely* upon deployment of competitive xDSL services nationwide. Founded in October 1996, Covad was one of the first companies to take advantage of the pro-entry policies of the 1996 Act, which permit companies like Covad to collocate in the central offices of incumbent LECs like SBC and Ameritech, and obtain access to unbundled local loops that are conditioned to provide high-bandwidth xDSL services. Covad has engaged in a nationwide entry strategy, encompassing collocation in 1000 incumbent local exchange carrier ("ILEC") central offices by the end of 1999. Covad's planned network deployment by the end of this year will cover 51 MSAs, more than 25% of the nation's homes and businesses. Currently, Covad's innovative next-generation DSL services are available in fifteen geographic regions and 36 MSAs. Covad launched its service in the Chicago area on April 28, 1999. Covad plans to collocate in and provide service from dozens of central offices in the State of Illinois. Covad is the only competitive xDSL provider that markets both residential and business DSL services. (Covad Ex. 1, pp. 1-2)

suggestions made by Covad and other parties to strengthen and improve those commitments are necessary to achieve the commitments' intended result.

In particular, Covad requests that the Commission:

- Modify Interconnection Commitment A to require SBC-Ameritech to offer Illinois competitive local exchange carriers ("CLECs") methods, terms and conditions that they offer CLECs in other SBC-Ameritech states -- regardless of whether those methods, terms and conditions were arbitrated in those other states.

- Require SBC-Ameritech to post a $300 million performance bond prior to the merger closing date to ensure compliance and to fund the various monetary commitments made by SBC-Ameritech in this proceeding.

- Adopt the pro-competitive conditions proposed by ACI Corporation ("ACI") and McLeodUSA Telecommunications Services, Inc. ("McLeod") in this proceeding with regard to elements and services related to xDSL and special construction charges.[2]

As requested by Chairman Mathias, Covad has also filed a Draft Order containing language to implement these conditions.

ARGUMENT

[2]Covad's inclusion of these proposals should not be taken to mean that Covad believes that the SBC-Ameritech merger is in the public interest or that the commitments and conditions proposed by SBC-Ameritech in this proceeding and before the Federal Communications Commission ("FCC") on July 1, 1999 (SBC/Am. Ex. 5, Sch. 1) ameliorate or mitigate the anti-competitive impact of this transaction. Indeed, Covad has several serious objections to several of the commitments proposed by SBC-Ameritech to the FCC, and has proposed suggestions to ameliorate those concerns. Given that Joint Petitioners have placed their July 1, 1999 FCC offer in this record, Attachment A to this Brief is Covad's July 19, 1999 FCC Comments on those proposed conditions. To the extent the Commission relies upon SBC-Ameritech's July 1 FCC offer, it should also fully consider Covad's attached comments.

I. INTERCONNECTION CONDITION A MUST BE AMENDED AS PROPOSED BY COVAD TO PREVENT SBC-AMERITECH FROM DISCRIMINATING AGAINST ARBITRATED METHODS, TERMS AND CONDITIONS

SBC-Ameritech have proposed to make available to CLECs in Illinois all negotiated interconnection methods, terms and conditions in effect in other SBC or Ameritech states. They refer to this commitment as Interconnection Commitment A. The purpose of Interconnection Commitment A is to speed entry by CLECs into Illinois by ostensibly making it easier for a CLEC to reach a negotiated interconnection agreement with SBC-Ameritech. If that process works as advertised, Illinois would be in a position to more readily adopt pro-competitive methods, terms and conditions of interconnection and access to unbundled network elements ("UNEs") implemented in other states without CLECs having to resort to arbitrations. However, without the modification proposed by Covad and other CLECs, the actual impact of this commitment will be minimal.

Speeding entry and adopting best practices are laudable goals. Covad works actively with organizations such as NARUC to make sure that those best practices are communicated among the state commissions. Frankly, however, SBC-Ameritech's "best practices" proposal does not amount to much because it would require CLECs to arbitrate in Illinois issues already resolved repeatedly in other state arbitrations. As a result, as proposed by SBC-Ameritech, Interconnection Commitment A would not make Illinois CLECs substantively better off since many significant issues (such as the methods, terms and conditions of unbundled xDSL loops) already resolved in other SBC-Ameritech states would not be "ported" to Illinois.

Covad and other parties have proposed modifications to Interconnection Commitment A that *would* speed entry into Illinois. (Covad Ex. 1, pp. 4-12; AT&T Ex. 1.2, pp. 10-14; ACI Ex. 1.0, pp. 16-17) Specifically, Covad proposes that Interconnection Commitment A be revised to require SBC-Ameritech to offer Illinois CLECs any method, term or condition of interconnection and nondiscriminatory access to unbundled network elements that SBC-Ameritech offers or provides in other states -- including those terms and conditions that were the subject of a state proceeding or arbitration. The Illinois Commerce Commission would retain the ability to establish the appropriate rates for these methods, terms, or conditions of interconnection and access. In addition, the Commission would retain the ability to alter or modify a particular method, term or condition in the Section 252 approval process. Until such a decision were made, however, SBC-Ameritech would be required to offer and provide the method, term or condition to requesting carriers. (Covad Ex. 1, pp. 4-5)

SBC-Ameritech have presented intellectually inconsistent arguments against this proposal which reflect a business decision to limit CLEC entry options, nothing else. The Commission should not accept these excuses and should modify Interconnection Commitment A as proposed by Covad and the other CLECs.

A. Availability of Arbitrated Methods, Terms and Conditions is Necessary in Order for Interconnection Commitment A to Speed Entry

As the testimony presented on behalf of Covad, ACI and AT&T makes clear, SBC-Ameritech's refusal to include arbitrated methods, terms and conditions in Interconnection

Commitment A vitiates the putative pro-competitive intent of that commitment. (Covad Ex. 1, pp. 4-12; AT&T Ex. 1.2, pp. 10-14; ACI Ex. 1.0, pp. 16-17)

This limitation is much more significant that SBC-Ameritech would have the Commission believe. Mr. Kahan -- who admittedly is "not an expert on our interconnection agreements" -- testified that SBC has only engaged in 33 arbitrations, and that 467 agreements "can be ported to Illinois" under Interconnection Commitment A. (Tr. 1874-75, 1877) That characterization likely vastly overstates the number of agreements that could indeed be "ported" to Illinois since Interconnection Commitment A would prohibit the availability of a method, term or condition of interconnection or access that was the subject of a state arbitration. Therefore, agreements that are based upon previously arbitrated terms (such as the AT&T Agreement in Texas, which is the foundation of the "Proposed Interconnection Agreement" in Texas) may not be "ported" to Illinois under this commitment. Covad believes that a good deal (perhaps even a majority) of the 467 agreements cited by Mr. Kahan would be excluded because of this limitation.

The Covad proposal, which is consistent with the proposals of other CLECs, should be adopted since it would vastly speed the interconnection negotiation process and therefore promote competition in Illinois by making all SBC-Ameritech interconnection agreements available in Illinois. Making *all* methods, terms and conditions in other SBC-Ameritech states available in Illinois (even arbitrated methods, terms and conditions) would essentially establish the following interconnection negotiation and approval process and timeline:

1. Upon commencing interconnection negotiations in Illinois, the CLEC may identify any particular method, term or condition of interconnection or access to UNEs that an SBC ILEC[3] offers or provides. (1 day for CLEC to make proposal)

2. SBC-Ameritech would be required to "offer" that method, term or condition of interconnection or access to UNEs to the CLEC in a negotiated interconnection agreement. (15-30 days to prepare written agreement)

3. The CLEC and SBC-Ameritech would submit the negotiated agreement to the Commission pursuant to Section 252 of the Telecommunications Act.

4. The Commission would approve, reject or modify the agreement within ninety days.[4] During this review proceeding, the Commission would, under its "public interest" authority, be able to review the negotiated agreement to determine its consistency with Illinois policies. *See* Section 252(e)(2)(A) and 220 ILCS 5/13-100 *et seq.*

5. Upon approval of the agreement CLEC network deployment could begin.

This process -- if implemented by SBC-Ameritech and the CLEC in good faith -- could result in implementation of a state-of-the-art interconnection agreement within 45 to 90 days. The final agreement would represent "best practices" developed by other states.

This "Open Door Policy" would make the State of Illinois a magnet for competitive entry

[3]The SBC-Ameritech ILECs would include Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company ("SWBT"), Southern New England Telephone Company ("SNET"), Ameritech Wisconsin, Ameritech Indiana, Ameritech Michigan, Ameritech Ohio, and all subsequently-acquired ILECs.

[4]Section 252(e)(2)(A) explicitly provides that the Commission may reject a negotiated interconnection agreement if it finds the agreement to be discriminatory or not consistent with the public interest, convenience and necessity.

by companies like Covad that provide innovative broadband services. Illinois consumers would benefit by swifter, more efficient CLEC entry. Effective local competition would actually have a chance of developing.

This pro-competitive alternative can be compared to the process SBC-Ameritech have proposed, which is essentially no different than the current process:

1. Upon commencing interconnection negotiations in Illinois, the CLEC identifies a particular method, term or condition of interconnection or access to UNEs that it has obtained from SBC ILEC through arbitration in another state. (1 day for CLEC to make proposal)

2. SBC-Ameritech consider this request and reject it, citing non-specific "network differences", "Illinois law," or the fact that their obligation does not extend to offering arbitrated terms. (15-90 days for non-specific responses and discussions)

3. If the CLEC is forced to file a petition, it cannot do so until 135 days have passed since its request to negotiate. (Section 252(b)(1)) CLEC network deployment plans in Illinois must be placed on hold during this period and during the arbitration.

4. SBC-Ameritech do not have to file their formal response to the arbitration petition until 25 days later. (Section 252(b)(3)) The parties then arbitrate whether this term or condition provided by SBC-Ameritech in another state should be provided in Illinois. Instead of deploying its network and services in Illinois, the CLEC instead pays lawyers, conducts discovery, takes depositions, and participates in a hearing.

5. The Commission decides the arbitration within nine months of the initial request to negotiate. (Section 252(b)(4)(C))

6. After the Commission's decision, the parties negotiate a final agreement, which is then submitted to the Commission for approval.

7. The Commission then has thirty days to approve this final agreement. (Section 252(e)(4))[5]

[5]By statute, the arbitration process takes 9 months, and after the arbitration, the Commission has 90 days to approve an arbitrated agreement.

8. CLEC may finally begin network deployment in Illinois.

The time difference between Covad's and SBC-Ameritech's proposals is substantial -- entry in 30-60 days versus entry in over one year. Clearly, Covad's proposal is more likely to spur competitive entry than Joint Petitioners' proposal.

Speeding up the interconnection negotiation process as proposed by Covad would be good for competition in all portions of the State of Illinois. As demonstrated by the record, the arbitration process is costly and laborious. (*See* Covad Ex. 1, pp. 5-6) Because CLEC costs are increased by the arbitration process, competitive entry for consumers living in less-affluent or rural areas will be delayed. (Tr. 2535-37) If Covad's proposal is adopted, Illinois CLECs would immediately begin to take advantage of pro-competitive developments in other states. This will result in SBC-Ameritech offering state-of-the-art methods and procedures as soon as possible in Illinois.

Fundamentally, the Commission's decision on this proposal comes down to whether the Commission wants more and faster competitive entry in Illinois. If the Commission is satisfied with the current level of competition in residential, broadband network services throughout Illinois and is comfortable presiding over litigation between ILECs and CLECs, it should merely accept SBC-Ameritech's proposal. However, if the Commission is dissatisfied with the current level of competition and availability of these broadband services, Covad's proposed modification to Interconnection Commitment A would speed the process greatly and indeed make the State of Illinois a magnet for CLEC entry.

B. There is No Valid Reason for SBC-Ameritech to Offer Negotiated, but not Arbitrated Methods, Terms and Conditions of Interconnection Other than to Further Their own Economic Interests

SBC-Ameritech want the Commission to believe that its proposed Interconnection Commitment A will speed the CLEC entry process. However, if that is the goal, it is difficult to understand why SBC-Ameritech only propose to offer negotiated methods, terms and conditions in Illinois, but not arbitrated methods, terms and conditions. Indeed, upon close scrutiny, the arguments presented by SBC-Ameritech in opposition to inclusion of arbitrated agreements in Interconnection Commitment A are, by SBC witness Kahan's own admission, intellectually inconsistent and ultimately self-serving. (Tr. 1935) Perhaps the clearest articulation of SBC-Ameritech's objection to including arbitrated methods, terms and conditions in this commitment was made by Mr. Kahan: "We think it's unfair to us." (Tr. 1978)

SBC-Ameritech make two arguments in opposition to porting arbitrated interconnection agreements to Illinois: (I) including arbitrated clauses would strip the Commission of its ability to implement and enforce Illinois law and policies; and (2) including arbitrated clauses would be unworkable because the network in Illinois may not be able to support a particular method, term or condition determined out- of-state. Neither of these arguments survives close scrutiny nor provides a sound rationale for distinguishing between "negotiated" and "arbitrated" methods, terms and conditions.

The Commission would not be "abrogating" its authority if Covad's proposal were adopted. Rather, the Commission would retain its authority to ensure that interconnection agreements comply with Illinois law and policies. Under Section 252 of the

Telecommunications Act, the ICC must approve the terms of *all* interconnection agreements -- even those voluntarily negotiated pursuant to Interconnection Commitment A. As Mr. Deanhardt testified, other states have used this authority to determine whether negotiated agreements are in the public interest. (Tr. 2539) SBC witness Hopfinger conceded that the public interest standard is one of the broadest standards in utility regulation. (Tr. 2229) The Commission will have to use this standard to review negotiated methods, terms and conditions that are ported to Illinois because of Interconnection Commitment A. The Commission can certainly use this standard in the same way in reviewing arbitrated methods, terms and conditions that are ported to Illinois.

In addition, the Commission would also need to ensure that ported methods, terms and conditions are otherwise consistent with the requirements of Article 13 of the Public Utilities Act. Thus, there is absolutely no basis for SBC-Ameritech's contention that the Commission would lose its ability to ensure that ported arbitrated methods, terms and conditions are consistent with Illinois laws and policies, and the public interest.

Most importantly, when it comes to the potential for abrogation of Commission authority, there is absolutely no difference between methods, terms and conditions that are negotiated and those that are arbitrated. In other words, if SBC-Ameritech are correct that the Commission's authority would be compromised by "porting" out-of-state arbitrated clauses to Illinois, that authority would be equally compromised by porting negotiated clauses as SBC-Ameritech propose through their Interconnection Commitment A. Thus, a negotiated method of access in California may be just as "inappropriate" in Illinois as

would an arbitrated method of access in Texas.[6] In short, SBC-Ameritech's rationale provides no sound intellectual reason to distinguish between "negotiated" and "arbitrated" clauses.

An additional reason offered by SBC-Ameritech for not including arbitrated methods, terms and conditions in Interconnection Commitment A is that there have been inconsistent arbitration decision in different states. (SBC/Amer. Ex. 1.5, p. 6) The same is also true with regard to negotiated methods, terms and conditions. Again, this rationale does not warrant differing treatment of negotiated and arbitrated clauses in Interconnection Commitment A.

[6]For example, Covad has a negotiated agreement with SBC in California, and is arbitrating an agreement with SBC in Texas. Both of these contracts will include terms and methods for the provision of unbundled xDSL loops. As proposed, Interconnection Commitment A would obligate SBC to offer the Covad/California xDSL terms in Illinois but permit it to refuse to provide Covad/Texas terms in Illinois.

Fundamentally, SBC/Amentech's limited offer has the potential of actually harming CLECs since it will force CLECs to engage in expensive state-by-state arbitrations over important clauses, which will inexorably slow the entry process. *See* Section I.C, below. The Commission has the opportunity to speed that process considerably by modifying Interconnection Commitment A in the manner proposed by Covad and other parties. Covad's proposed amendment to Interconnection Commitment A would *not* bind the Commission in approving or permitting such methods, terms and conditions or in finding that such methods, terms and conditions cannot be utilized on the Illinois network.[7] Covad's proposal is superior to SBC-Ameritech's proposal, and should be adopted.

In conclusion, SBC-Ameritech have not presented a sound substantive reason why "arbitrated" clauses should be excluded from Interconnection Commitment A. The arguments SBC-Ameritech raise apply with equal weight to "negotiated" clauses and therefore do not justify the distinction SBC-Ameritech have drawn. At bottom, SBC-Ameritech's argument for discriminating against arbitrated clauses comes down to a business choice: SBC-Ameritech do not want to extend their substantive losses in the

[7]Indeed, Covad welcomes continued Commission investigation into these methods, terms and conditions. The principle purpose of Covad's proposed modification of Interconnection Commitment A is to counterbalance the bargaining power that ILECs have in interconnection negotiations. Currently, ILECs have the ability to say "no" to a CLEC and force the year delay caused by the arbitration process. This situation delays competitive entry.

arbitration process beyond state lines but they are more than willing to impose multi-state "voluntary" policies on Illinois CLECs.

C. Covad's Uncontroverted Testimony Demonstrates the Delays and Pitfalls that the Arbitration Process Causes

When questioned about implementation of Interconnection Commitment A, SBC-Ameritech witnesses invariably stated that CLECs may rely upon the Section 252 arbitration process to enforce their interconnection rights.[8] This reliance upon the arbitration process to "right all wrongs" must lead the Commission to question whether the arbitration process is an effective means of promoting competitive entry. The uncontroverted testimony by Covad demonstrates that the arbitration process is not and indeed actually delays competitive entry. This seems particularly true when it comes to arbitrations involving SBC.

Covad witness Deanhardt testified regarding Covad's current arbitration with SBC's ILEC subsidiary in Texas, SWBT. SBC-Ameritech did little to rebut that testimony, other than to contend that Mr. Deanhardt's testimony was "inappropriate." (*See* SBC/Amer. Ex. 11.2, p. 3) The witness presented by SBC on this issue, Mr. Hopfinger, was not and is not involved in the Texas arbitration proceeding about which he proffered testimony. (Tr.

[8] *See, e.g.,* Tr. 1874 ("if we don't reach agreement, you go to arbitration"); Tr. 1876 ("if there's a debate, the CLEC always has the right to go to arbitration in Illinois"); Tr. 1882 ("if there's a debate, it would come back to arbitration in Illinois"); Tr. 1978 ("If they fail to reach agreement, they arbitrate it"); Tr. 1994 ("[t]hen you are going to take it to arbitration, it's going to end up in the Commission's lap"); Tr. 1995 ("it goes through the arbitration process . . . [y]ou arbitrate, it goes to the Commission, the arbitration says Ameritech Illinois you are wrong, do if"); Tr. 1998 ("arbitrations are a fundamental part of the Telecom Act. It's a common business practice.... You have the same problems negotiating, arbitrating agreements with Ameritech Illinois.").

2231) Mr. Hopfinger's entire testimony on this topic is based on information that was given to him regarding the events in Texas. (*Id*.) While Mr. Hopfinger described an Interim Agreement between Covad and SWBT, he was unaware of the date of the agreement, why it was entered into or its terms. (Tr. 2233) Neither did Mr. Hopfinger know whether Covad was up and running yet in Texas. (Tr. 2235) The cross examination of Mr. Hopfinger[9] established that Mr. Deanhardt was the only knowledgeable witness concerning the Texas arbitration.

[9]This testimony is particularly significant given the Hearing Examiners' conclusion that evidence presented by a witness who has no personal knowledge of some of the events about which he testifies is not probative. (*See* Tr. 2583-84)

Mr. Deanhardt's uncontradicted testimony revealed that SBC withheld critical documents from production during discovery, presented witnesses with little if any substantive knowledge of SBC's wholesale methods and procedures[10], and engaged in tactics that, in Mr. Deanhardt's opinion, were intended to obstruct the truth seeking function of the arbitration process. After the close of hearings on reopening, the Texas Arbitrators indeed concluded that Mr. Deanhardt is correct. Attached to this Brief as Attachment B is Order 20 issued by the Texas Arbitrators granting in part Covad's Motion for Sanctions.[11] (the Arbitrators' Order which is attached hereto as Attachment B is hereafter referred to as "Order")

As Mr. Deanhardt claimed (*see* Covad Ex. 1, pp. 16-17), the Texas Arbitrators found that SWBT engaged in a series of actions which prevented Covad from obtaining and reviewing important information regarding the central issues in the arbitration and which were an abuse of discovery. Specifically, the Arbitrators stated in relevant part as follows:

[10]This conduct can be compared to SBC's conduct in this case wherein it presented a witness to rebut allegations regarding the Texas arbitration who had absolutely no personal, first hand knowledge regarding that arbitration.

[11]The Texas Arbitrators' Order on sanctions was issued July 27, 1999. The Order was issued pursuant to the Arbitrators' authority, but is appealable to the Texas Commission. (Rule 22.161(e)) A sanctions order is also automatically stayed pending appeal. (*Id*.) SWBT has ten days from the issuance of the Order to file its appeal. Covad does not believe that it is necessary to seek administrative notice of this Order for purposes of citing its findings and conclusions in this Brief. However, in the event the Hearing Examiners conclude that it is necessary to seek administrative notice of this Order, Covad hereby requests that the Hearing Examiners do so, pursuant to 83 Ill. Admin. Code § 200.640.

> The Arbitrators grant Petitioners' motions for sanctions in part and deny them in part. The Arbitrators find that SWBT's failure to produce requested documents and the directive contained in ACI Exhibit 153 (Attachment B) constitute an abuse of discovery. The Arbitrators also find that SWBT's failure to provide witnesses who were knowledgeable about their company's activities on which they were providing testimony was an abuse of discovery. (Order 20, p. 4)

While SBC-Ameritech attempted to attack the veracity of Mr. Deanhardt's testimony concerning the discovery abuses which he stated took place, the Arbitrators' Order proves that Mr. Deanhardt was correct. Specifically, Mr. Deanhardt claimed that the following discovery abuses occurred, and the Arbitrators agreed:[12]

- Failing to produce responsive, relevant documents prior to the April arbitration hearing, which caused the Arbitrators to order an abrupt end to the hearings, that discovery be re-opened, and that hearings be rescheduled in June. (*See* Order, pp. 4-5, 26-30, 33)

- Failing to search for requested documents from SWBT employees developing and implementing its retail and wholesale DSL strategies. (*See* Order, pp. 4, 24-26, 29-30, 33)

- Producing only 7% of all responsive documents prior to the first arbitration hearing. (*See* Order, pp. 4, 26-30, 33)

- Offering as witnesses only members of SWBT's cadre of "professional" witnesses who are not directly involved in SWBT's DSL implementation plans. (*See* Order, pp. 4, 24-26, 33)

[12]Covad also contends that other discovery abuses occurred, such as: delaying production of critical documents during the re-opened discovery until *after* depositions were completed so that Covad could not question SWBT's witnesses about the documents; producing nearly 2/3 of the documents produced in the arbitration after Covad filed direct testimony and less than one week before the re-commencement of the arbitration, which prevented Covad from being able to effectively review and prepare potential evidence for the Arbitrators' consideration, and; improperly redacting and withholding documents to prevent discovery of information that may be contrary to SWBT's position. (*See* Covad Ex. 1, pp. 16-17) These abuses occurred after the motion for sanctions was filed, and therefore are not addressed in the Arbitrators' Order.

SBC chose not to rebut any of these factual statements - because it could not.[13]

The Arbitrators concluded as follows:

> Compliance with Commission rules and applicable state and federal law is not optional in matters of litigation before the Commission. It is in the public interest that the Commission make informed decisions based on complete discovery and whole truths. Through its actions, intentional or not, SWBT has failed to comply with rules of discovery that exist to require parties to bring forward the truth in public proceedings. Parties involved in interconnection disputes before the Commission have the duty to bring forward the whole truth. Therefore, a party before the Commission may not choose to totally ignore Commission rules related to discovery requests.

(Order, p. 36) The Arbitrators required SWBT to pay Covad and ACI's attorneys fees, expenses and costs as a result of SWBT's failure to produce the requested information. (Order, p. 34)

Mr. Deanhardt testified that Covad's entry into Texas has been delayed because of SBC's actions. SBC-Ameritech attempted to establish that Covad is currently building its network in Texas pursuant to an interim interconnection agreement dated May 29, 1999

[13]The Hearing Examiners took the position that these facts are not relevant to this Commission's determination because the Texas arbitration has not been concluded. (*See* Tr. 2584) These facts relate to discovery problems which have already occurred and were problems regardless of the ultimate outcome of the arbitration proceeding. Moreover, how can it be deemed anything other than relevant that the *Arbitrators* called a halt to the hearings once they became aware of SBC's dilatory and uncooperative discovery practices?

and that therefore Covad has suffered no delay. Further, SBC sought to leave the impression through its cross-examination of Mr. Deanhardt that Covad was hiding the fact that an interim agreement is in place. (*See* Tr. 2489) This argument could not be further from the truth. What SBC-Ameritech did not state (since it offered no knowledgeable witness) was that this interim agreement was an extraordinary step taken pursuant to an order by the Texas Arbitrators requiring SBC to provide the services necessary for Covad to get up and running in Texas. As Mr. Deanhardt explained, SBC only entered into the interim arrangement after the Arbitrators ordered that SBC remedy the delay caused by its actions in the arbitration. (Tr. 2549-50; Cross Exhibit I)

The interim agreement was executed pursuant to Order No. 5, Interim Order entered by the Texas Arbitrators, a copy of which was provided as Cross Exhibit I and is attached to this Brief as Attachment C. This interim order was issued because of the Arbitrators' concern that "unnecessary delays in these proceedings [were] causing harm to ACI and Covad." (Cross Exhibit I, p. 2) The Arbitrators' concerns were "heightened" by "SWBT's position during the initial portion of the hearing" that it need not comply with the FCC's order on Advanced Services. (*Id*.) The interim order confirms what Mr. Deanhardt stated, wherein it states:

> [T]he current discovery dispute and motions for sanctions have necessitated that the schedule be extended, and that additional time be required to complete these proceedings. . . . Due to these delays, ACI and Covad have requested that the Arbitrators issue an interim order to allow them to be operational in many respects pending final resolution of these proceedings. . . . For all these reasons, the Arbitrators order SWBT to begin processing ACI's and Covad's collocation orders immediately. The Arbitrators further

> order that, to the extent possible, SWBT also begin processing orders for circuits and transport arrangements.[14]

(*Id*.) The remainder of the interim order contains the details as to how SWBT would provide these services.

The evidence establishes that although Covad is currently building a network in Texas, it is doing so only after several months of delay, and only because the Texas Arbitrators required SBC to allow Covad to do so. Moreover, the interim agreement states that it is "not [to] be used by either party in the Arbitration or any other regulatory or judicial proceeding to characterize that the terms in the [interim] agreement are appropriate on an ongoing basis." (Cross Exhibit F, pp. 1-2) Thus, SBC-Ameritech's argument that the interim agreement provides Covad the terms it needs on an ongoing basis to operate in Texas must be disregarded by this Commission.

Significantly, Covad still does not have a permanent interconnection agreement with SBC. Further, the temporary pricing in the interim agreement is subject to true-up once a final agreement is reached. (Cross Exhibit I, p. 4) Thus, any build out in Texas is at Covad's own risk, since Covad has no idea what all of the permanent interconnection and UNE prices, terms and conditions will be. These facts establish that the interim agreement does little to tear down the entry barriers in Texas that have been set up by SBC. These facts also establish what Covad has argued on reopening -- Covad has been

[14]The interim order also rebuts SBC's attorney's claims at the hearing that there had been no determination by the Texas Commission that delays had occurred which harmed Covad. (*See* Tr. 2580)

delayed in entering the Texas market as a result of the need to arbitrate with SBC and as a result of SBC's conduct in the arbitration. The fact that a Texas arbitration panel ordered extraordinary, interim relief for Covad (Interim Order 5) because of SBC's anticompetitive actions should provide this Commission little solace.

SBC also sought to establish that any delay Covad may have experienced in Texas was as a result of its own actions. SBC's efforts utterly failed. What Mr. Deanhardt stated was that Covad's entry into the market was delayed by about six months as a result Covad's inability to reach agreement with SBC on the necessary terms and conditions of interconnection. (Covad Ex. 1, p. 5) When pressed on when those six months began, Mr. Deanhardt stated that the six months began in December of last year and continued until June when SBC was required to enter into the interim agreement. (Tr. 2458-59) Mr. Deanhardt stated that the delay was caused by SBC taking "unreasonable positions in the negotiations" which forced Covad to file for arbitration. (Tr. 2459-60)

SBC further attempted to show that by amending its arbitration petition, Covad caused the delay. (*See* Tr. 2502-05) What Mr. Deanhardt made clear is that the reason for the amendments was an effort by the parties to try to negotiate and work out these issues rather than having to arbitrate the issues, a result that would have been in both parties' interest. (Tr. 2564-66) Mr. Deanhardt was clear that filing the amended petitions "did nothing to affect the arbitration date, so ultimately the fact that we couldn't reach resolution of these issues caused this delay." (Tr. 2565) Again, SBC was unsuccessful in attacking Mr. Deanhardt's credibility or disproving his testimony that SBC's conduct

delayed Covad's entry in Texas. SBC offered no testimony of its own on this issue although it had full opportunity to do so.

Covad's experience with SBC in Texas is another step in a disturbing pattern with SBC. Staff witness Rasha Toppozada-Yow previously testified in this proceeding about a 1998 arbitration order involving Covad and SBC's California subsidiary Pacific Bell which found that SBC's subsidiary had not acted in good faith in its provision of collocation and unbundled elements to Covad.[15] (*See* Covad Ex. 1, p. 6) As the California Order, which was an exhibit to Ms. Yow's testimony, indicates, the California arbitrators found that SBC's California ILEC subsidiary, Pacific Bell, breached its obligation of good faith performance in implementing its interconnection agreement with Covad in a fundamental and pervasive way. (*See* ICC Staff Ex. 1.1, Attachment 5) The panel also ruled that Pacific Bell's unilateral rejection of alternative means of collocation exacerbated the harm to Covad of Pacific's non-performance. (*Id*.) These repeated incidents in which SBC has not acted in good faith are clearly relevant to the Chairman's concern regarding the viability of Joint Applicants' commitments, and give the Commission sound basis for adopting Covad's proposal.[16]

[15]Since this decision was entered, Pacific Bell has filed a motion in California state court to vacate the ruling.

[16]The FCC recently issued a Consent Decree closing its investigation into SBC's conduct in the SBC/SNET merger proceeding. As part of the Consent Decree, SBC made a payment of $1.3 million to the U.S. Treasury, agreed to adopt a new compliance plan to ensure "future compliance" with Sections 271 and 272 in the context of mergers, and also agreed to create a "training program on the obligations of SBC employees when they are meeting with the FCC." In addition, senior SBC corporate officers submitted declarations to the FCC stating that they did not have knowledge of the conduct of SBC employees that formed the subject of the FCC's investigation. (Covad Ex. 1, pp. 20-21) The Consent

Mr. Deanhardt's testimony was not intended to impugn or smear SBC's integrity as SBC contended (*see* Tr. 2581) but rather to inform the Commission about the rough-and tumble nature of the arbitration process with SBC. The testimony shows that the manner in which SBC conducts itself in arbitrations and other regulatory disputes is inexorably linked to whether Interconnection Commitment A is sufficient to speed competitive entry. Covad's experience suggests that the Commission should not *solely* rely upon the arbitration process to open the Illinois market to competition, which is what it would be forced to do were it to adopt Interconnection Commitment A as proposed by SBC-Ameritech. Rather, the Commission should give new entrants like Covad a better chance of quick entry by adopting Covad's proposal.

Covad's real world experiences as a start-up company that is aggressively entering the market to provide broadband services demonstrate that SBC has *not* sought to expedite Covad's successful entry into the market. Indeed, the opposite is true -- SBC's subsidiaries in Texas and California have delayed Covad's entry into the market. Nevertheless, SBC-Ameritech would have this Commission believe that it can trust the current interconnection negotiation and arbitration process to establish pro-competitive

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Decree attached to the Compliance Plan explains at paragraph 10 that "SBC had not been in compliance with section 272" and that SBC's "internal processes and procedures for identifying and resolving section 272 issues relating to the SNET merger caused some compliance problems and mistakes." *In the Matter of SBC Communications Inc.*, FCC 99-153, Order (June 28, 1999) This is but another example of SBC's failure to follow all rules.

policies in Illinois. The Commission cannot ignore the real world evidence presented by Covad, which demonstrates SBC's callous disregard for regulatory proceedings and requirements. This real world experience mandates the conclusion that Interconnection Commitment A should be modified as proposed by Covad.

D. Conclusion

In summary, what SBC-Ameritech promise to provide in Interconnection Commitment A -- "voluntary" terms only -- is not much of a concession. Today, a CLEC like Covad often must settle for "second (or third, or fourth) best" agreements in certain states because resource requirements and business necessity mean that arbitrating in every state is not an option. Since every month of arbitration is a month in which CLECs like Covad cannot enter the market or provide more efficient service to consumers, ILECs like SBC and Ameritech have an incentive to continue this litigation state-by-state. As proposed by SBC-Ameritech, Interconnection Commitment A does nothing to solve that problem and indeed could make it worse, since it would create an additional incentive for SBC-Ameritech to arbitrate rather than negotiate. (Covad Ex. 1, p. 9)

Covad's proposal would remove the effective "veto" power that Ameritech currently holds -- the power to refuse unilaterally a method, term or condition and demand that the CLEC put its business case on hold and at risk until the issue can be resolved in an arbitration proceeding in Illinois.[17] Under Covad's proposal, SBC-Ameritech would, at the

[17]This risk is particularly acute when it comes to methods, terms and conditions of collocation. The first step Covad takes in entering a market is to order dozens of collocation spaces. Waiting nine months or longer for the methods, terms and conditions of cageless collocation to be resolved through an interconnection arbitration is, literally, nine months of delayed roll-out.

request of a carrier, be required to offer in Illinois any method, term or condition of interconnection or access that SBC-Ameritech offer or provide in another state, even if that method, term or condition was the result of an arbitration. Since the Commission must review and approve every interconnection agreement pursuant to Section 252, it already has a forum to review and assess these particular methods, terms and conditions of interconnection and access.

The benefit of Covad's proposal is that Illinois CLECs would *not* have to endure unilateral rejections and delays by SBC-Ameritech over these methods, terms and conditions. Instead, SBC-Ameritech would be required to provide those methods, terms and conditions in interconnection negotiations, and the Commission could review the appropriateness of those methods, terms and conditions in the interconnection agreement review process for consistency with the public interest and Illinois law. Covad's proposal is particularly compelling in light of the facts regarding the manner in which SBC has conducted itself in arbitration and other regulatory proceedings.

II. THE COMMISSION SHOULD REQUIRE SBC-AMERITECH TO POST A $300 MILLION PERFORMANCE BOND AS A CONDITION OF THE MERGER

In his June 15th letter, Chairman Mathias asked SBC-Ameritech whether they had considered posting a performance bond in Illinois to ensure compliance with conditions of the merger. (Issue 11(e)) SBC-Ameritech ignored that question in their June 18th response to the Chairman, except to explain how the bond requirement came to pass in Ohio. SBC-Ameritech addressed this issue with respect to Illinois only after Covad proposed that SBC-Ameritech be required to post a $300 million performance bond as a

condition of the merger.[18] (*See* Covad Ex. 1, pp. 3-4) SBC-Ameritech's response was too little too late.

Covad's proposal would serve the public interest and promote competition in Illinois because it would provide the following benefits:

- The bond would ensure that SBC-Ameritech swiftly pay liquidated damages or strict liability fines that result from non-compliance with any Commission-imposed conditions or the provisions of the 1996 Act. If SBC-Ameritech is permitted to delay such payments pending appeal, the impact of those fines upon day-to-day compliance with the conditions and the Act would be highly attenuated. The bond would help make enforcement swift, certain and sure.

- Interest from the bond could be used to fund SBC-Ameritech's proposed multi-million dollar annual commitments to the Community Technology Fund, the Consumer Education Fund, and Illinois charitable donations. Indeed, interest on the bond would be able to support substantial increases in donations to these causes over SBC-Ameritech's original offer.

- Interest on the bond could also be used to fund Commission enforcement actions caused by this merger, such as additional staff, travel and consultants.

With regard to the last point, the Commission must not underestimate the impact that the merger conditions would have upon the Commission's resources. Between the ICC and FCC proposals, SBC-Ameritech have proposed more than *ten* collaborative-type processes, or network trials, audits or proceedings on topics that will greatly impact the development of competition in Illinois. In addition to the myriad Illinois collaboratives and other requirements, the processes required at the Federal level that will impact Illinois entry include:

[18]Covad has also proposed a performance bond requirement as a condition of FCC approval of the SBC-Ameritech merger. (*See* Attachment A hereto)

- Audit of compliance with collocation rules;
- Collaborative process to implement uniform application-to-application interfaces and graphical user interfaces;
- Collaborative process to establish uniform OSS business rules;
- Collaborative process to establish uniform change management process;
- Collaborative process to establish xDSL loop pre-ordering and ordering OSS;
- A trial of access to MDUs and multi-tenant business premises; and
- Annual compliance audits.

This extensive list of responsibilities and activities does not include other initiatives currently being undertaken by Staff, such as the re-write of Part 790 to take into account the FCC's March 31, 1999 *Advanced Wireline Services Order,* among other things. Those collocation reform rules contemplate heightened staff involvement in collocation space disputes, such as Staff travel for inspections of "no space" offices that are required by the new federal rules. And *none* of the above contemplates the work that would be required by a future SBC-Ameritech Section 271 proceeding in Illinois.

These exhaustive processes which SBC-Ameritech have proposed will require a massive amount of work be completed in a short period of time. Interest on the bond could be utilized to fund Staff participation in these processes or to increase funds available for Staff to retain consultants, such as an independent third party OSS tester. The Commission should not rely upon the ostensible pro-competitive benefits of those conditions in its assessment of this merger without providing Staff adequate resources to

ensure compliance with those conditions. Covad believes that a performance bond could be used to meet that objective.

SBC witness Kahan argued that a performance bond is only necessary if the Commission is concerned about SBC-Ameritech's ability to pay future fines or damages. (*See* SBC/Amer. Ex. 1.5 p. 15) Given the efficiencies of this merger testified to by Mr. Gebhardt, Covad does not doubt that SBC-Ameritech will have the ability to pay millions of dollars of fines in the future. However, Mr. Kahan's testimony begs the core reason for Covad's performance proposal: (1) since it would be paid up-front, the bond will facilitate immediate payment of damages to CLECs for breaches of the performance parity plan and fines; (2) interest on the bond would fund public interest commitments to the Community Technology Fund, Consumer Education Fund, and Illinois charitable contributions; and (3) interest on the bond would help provide much-needed ICC resources which could be used by the ICC Staff to implement and enforce any conditions of the merger. (Covad Ex. 1, pp. 3-4)

A bond would also provide SBC-Ameritech with a much stronger incentive to comply with the merger conditions and the market-opening provisions of the 1996 Act than a "promise to pay" in the future. As the reciprocal compensation experience demonstrates, it can sometimes take years for CLECs to receive funds that are owed to them by ILECs. (*See* McLeodUSA Ex. 1, pp. 3-4)

The overwhelming evidence supports adoption of Covad’s proposal that SBC-Ameritech post a performance bond in the amount of $300 million.

III. THE COMMISSION SHOULD ADOPT THE ACI AND McLEODUSA PROPOSALS REGARDING SPECIAL CONSTRUCTION CHARGES

Special construction charges are a particular problem for CLECs providing DSL services. (*See* McLeodUSA Ex. 1, pp. 4-6; ACI Ex. 1.0, p. 9) Special construction charges are often assessed when the loop must be conditioned for certain services, or when the customer is served through the use of a digital loop carrier. These circumstances arise in the provision of xDSL services. These non-recurring charges can amount to thousands of dollars depending upon the facility requested. This is true even though Ameritech imposes *no charge at all* on its end use customer when it provides the *same* service to the *same* location. The imposition of special construction charges is a competitive barrier to competition for xDSL services. (McLeodUSA Ex. 1, pp. 4-6)

Joint Petitioners contend that these special construction charges are appropriate since they result in the "cost causer" paying. (SBC/Am. Ex. 12.1, p. 16) The actual result of this practice is the cost causer pays twice. Under the forward-looking TELRIC pricing standards used to determine rates for unbundled loops, loop costs already include the costs to unbundle the loop. (McLeodUSA Ex. 1, pp. 4-6) The witness put forth by Joint Petitioners to address this issue, Mr. Appenzeller, testified that he did not know whether the costs recovered through special construction charges, including those for conditioning the loop for xDSL service, are actually included in TELRIC-based UNE prices. (Tr. 2394-95) Although Mr. Appenzeller's refrain on this point was to ensure that those who cause the costs pay, he conceded that the CLEC does not cause the cost of conditioning the line since conditioning amounts to removing interferers that Ameritech has put on the system. (*Id*.) The Commission can reach no other conclusion but that special construction

charges amount to a double-recovery windfall for Ameritech and erect a competitive, discriminatory barrier to CLECs' entry into the market.

This situation is complicated by Ameritech's refusal to provide CLECs with access to its existing databases which include information about the existence and type of copper facilities, the presence and types of digital loop carrier deployed, and the deployment of equipment such as load coils, taps and repeaters. As a result of this refusal, CLECs have no way of determining in advance whether there will be impediments to using unbundled loops to provide service to a particular customer, or when Ameritech might attempt to apply special construction charges. (McLeodUSA Ex. 1, p. 5; ACI Ex. 1.0, pp. 10-12) This makes doing business difficult, to say the least.

In conclusion, the Commission should prohibit SBC-Ameritech from imposing unreasonable and cost-prohibitive special construction charges on CLECs. These charges are plainly inconsistent with forward-looking TELRIC pricing of unbundled network elements. In addition, these charges are discriminatory -- there is no valid reason for competitive carriers to be charged a special construction charge that Ameritech does *not* charge its own end users to provide the same loop at the same location to the same end user. Moreover, the Commission should require SBC-Ameritech to provide CLECs access to databases which include information about the existence and type of copper facilities, the presence and types of digital loop carrier deployed, and the deployment of equipment such as load coils, taps and repeaters, as a condition of approval of the merger.

CONCLUSION

This proceeding was reopened to address specific issues of concern to this Commission regarding the impact of the proposed merger on the development of local competition in Illinois. SBC-Ameritech have offered several commitments which are allegedly intended to promote competitive entry in Illinois. However, a closer look at those commitments reveals that they fall short of the actions required to truly open the Illinois local market. The evidence also establishes a troubling pattern of conduct on the part of SBC which should cause the Commission to tighten the commitments in order to ensure they provide substantive benefits. Accordingly, Covad and other parties have proposed modifications to those conditions to strengthen and improve SBC-Ameritech's commitment to competitive entry.

Specifically, if the Commission approves the merger, it should modify SBC-Ameritech's commitments as follows:

- Modify Interconnection Commitment A to require SBC-Ameritech to also offer CLECs arbitrated interconnection agreements.

- Require SBC-Ameritech to post a $300 million performance bond prior to the merger closing date to ensure compliance and to fund the various monetary commitments made by SBC-Ameritech in this proceeding.

- Prohibit the imposition of special construction charges for the provision of xDSL unless: (1) it can be shown that the costs to be recovered through those charges are not already being recovered through the TELRIC pricing, and; (2) SBC-Ameritech charge their end use customers the same special construction charges.

- Require SBC-Ameritech to provide CLECs access to necessary information concerning xDSL loops.

The Commission must find that only by taking these actions will the promises of Joint Petitioners' proposal translate into actual public interest benefits.

Covad has concurrently filed a Draft Order containing proposed order language for the conditions the Commission should impose if it determines to approve the merger.

Respectfully submitted,

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